Wan Mohd Kamil bin Wan Mohamad v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO B–05–13 OF 1996
MOKHTAR SIDIN, ABDUL KADIR SULAIMAN AND PS GILL JJCA
5 FEBRUARY 2003

Criminal Law *— Dangerous Drugs Act 1950 — s 39B(1)(a) — Appellant convicted for trafficking in dangerous drugs — Trial judge made no affirmative finding of possession — Trial judge relied on legal presumption of possession and proceeded to make a further presumption of trafficking against appellant under s 37(da) — Whether trial judge applied 'double presumption' test — Whether trial judge misdirected himself in law*

Criminal Law *— Dangerous Drugs Act 1950 — s 39B(1)(a) — Appellant convicted for trafficking in dangerous drugs — Total denial of possession of drugs by appellant — Trial judge undertook separate exercise to consider whether defence had rebutted statutory presumption of trafficking under s 37(da) — Whether evidence in instant case did not obviously warrant separate exercise*

Criminal Procedure *— Appeal — Conviction and sentence, against — Ground that trial judge misdirected himself in law in invoking presumption of trafficking upon a presumption of possession of drugs — Whether trial judge applied 'double presumption' test — Whether trial judge misdirected himself in law*

Criminal Procedure *— Appeal — Conviction and sentence, against — Ground that trial judge wrong in accepting evidence of chemist — Chemist took representative samples at random from different parts of plant material drugs — Chemist carried out detailed analysis of plant material in packages — Whether evidence given by chemist satisfactory*

This was an appeal by the appellant against the decision of the High Court convicting him for an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and sentencing him to death. The issues raised in this appeal were: (a) whether the trial judge was wrong in accepting the evidence of the chemist; and (b) whether the trial judge had misdirected himself in law in invoking the presumption of trafficking upon a presumption of possession of the drugs. The trial judge found the appellant to have had custody and control of the drugs in question and accordingly presumed that the appellant was in possession of the drugs pursuant to s 37(d) of the Act. Having found the appellant to be in possession of the drugs, the learned judge then went on to presume the appellant to be a trafficker under s 37(da) of the Act since he was 'found in possession' of more than the statutory minimum prescribed in the subsection. The chemist's testimony at the trial was that he had conducted a physical examination of the plant material in the packets marked 'A' and 'A1' and found that the plant material belonged to one type similar to cannabis. The chemist also carried out microscopic examination on the plant material and found the same to bear the characteristic features of cannabis. Thereafter, the chemist took 32 random samples from the bulk of the plant

material to perform the Duquenois-Levine test ('DLT') and the thin layer chomotrophy test ('TLC') and from the two tests conducted, the chemist found the presence of cannabinoid. Hence, the chemist concluded that all the plant material was cannabis as defined under s 2 of the Act. The chemist testified that after the physical and microscopic examination, he had concluded that all the plant material was of the genus cannabis and if any part of the plant material was found to be cannabis, the entire bulk must be the same. Hence, according to the chemist, there was no necessity to subject the entire plant materials to the DLT and TLC tests.

Held:

(1) The chemist took representative samples at random, from the different parts of the impugned drugs in packages 'A' and 'A1' for analysis. It was clear that the chemist had carried out a detailed analysis of the plant contained in the two packages and he had testified positively that the result of his tests showed that the plant material was cannabis as defined under s 2 of the Act. The evidence given by the chemist was satisfactory and cannot be faulted. Accordingly, the appeal on this issue was without merit (see pp 22H, 23A–B); *Leong Bon Huat v Public Prosecutor* [1993] 3 MLJ 11 distinguished.

(2) The trial judge made no affirmative finding of possession on the evidence. He merely relied on the legal presumption of possession under s 37(d) of the Act. Having relied on the presumption under s 37(d), the trial judge then proceeded to make a further presumption of trafficking against the appellant under s 37(da) in view of the amount of drugs. Hence, the trial judge had clearly applied the 'double presumption' test, thereby misdirecting himself in law (see p 24C–D); *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 followed.

(3) In *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169, the Supreme Court had held that it was incumbent upon the court to consider whether on a balance of probabilities, the defence had rebutted the statutory presumption of trafficking under s 37(da) of the Act, as a separate exercise, even though the court was satisfied on a balance of probabilities that the presumption of possession under s 37(d) of the Act had not been rebutted, unless the evidence in that particular case did not obviously warrant it. In the instant case, the defence of the appellant was a total denial of possession of the drug. Thus, there was no need for the trial judge to undertake a separate exercise as he had seemed to have done in respect of the statutory presumption under s 37(da) of the Act (see pp 24H–I, 25A–B); *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 and *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644 followed.

(4) Therefore, the appellant's sentence of death was quashed. The charge against the appellant was amended to one under s 12(2) of the Act and the appellant was accordingly sentenced to five years' imprisonment with effect from his date of arrest (see p 25B).

[**Bahasa Malaysia summary**

Ini adalah rayuan oleh perayu terhadap keputusan Mahkamah Tinggi menyabitkan beliau kerana satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') dan menjatuhkan hukuman mati ke atas beliau. Persoalan-persoalan yang ditimbulkan dalam rayuan ini adalah: (a) sama ada hakim perbicaraan terkhilaf dalam menerima keterangan ahli kimia; dan (b) sama ada hakim perbicaraan tersalah arah dalam undang-undang apabila menggunakan anggapan pengedaran ke atas satu anggapan pemilikan dadah. Hakim perbicaraan mendapati bahawa perayu memiliki dan mengawal dadah yang dipersoalkan dan sewajarnya menganggap bahawa perayu memiliki dadah tersebut menurut s 37(d) Akta tersebut. Setelah mendapati bahawa perayu memiliki dadah tersebut, hakim yang bijaksana kemudian telah menganggap perayu sebagai seorang pengedar di bawah s 37(da) Akta tersebut memandangkan beliau 'found in possession' lebih daripada had minima statutori yang dinyatakan dalam subseksyen tersebut. Testimoni ahli kimia semasa perbicaraan adalah bahawa beliau telah melakukan satu pemeriksaan fisikal ke atas bahan tumbuhan dalam bungkusan-bungkusan yang ditandakan 'A' dan 'A1' dan mendapati bahawa bahan tumbuhan adalah sejenis dengan kanabis. Ahli kimia tersebut juga melakukan satu pemeriksaan mikroskopik ke atas bahan tumbuhan tersebut dan mendapati ianya mempunyai ciri-ciri kanabis. Berikutan itu, ahli kimia mengambil 32 sampel secara rambang daripada sejumlah besar bahan tumbuhan tersebut untuk melakukan ujian Duquenois-Levine ('DLT') dan ujian komotrofi lapisan nipis ('TLC') dan daripada dua ujian yang dilakukan, ahli kimia mendapati terdapat kehadiran cannabinoid. Justeru itu, ahli kimia membuat kesimpulan bahawa semua bahan tumbuhan tersebut adalah kanabis seperti yang ditafsirkan di bawah s 2 Akta tersebut. Ahli kimia memberi keterangan bahawa selepas pemeriksaan fisikal dan mikroskopik tersebut, beliau membuat kesimpulan bahawa semua bahan tumbuhan tersebut adalah genus kanabis dan jika mana-mana bahagian daripada bahan tumbuhan tersebut didapati adalah kanabis, keseluruhan bungkusan tersebut adalah sama. Oleh itu, menurut ahli kimia tersebut, tiada keperluan untuk melakukan ujian-ujian DLT dan TLC ke atas keseluruhan bahan tumbuhan tersebut.

Diputuskan:

(1) Ahli kimia tersebut telah mengambil sampel-sampel tersebut secara rambang, daripada bahagian-bahagian lain dadah yang

dipersoalkan dalam bungkusan-bungkusan 'A' dan 'A1' untuk dianalisa. Adalah jelas bahawa ahli kimia telah melakukan satu analisis terperinci ke atas tumbuhan yang terkandung dalam dua bungkusan tersebut dan beliau telah memberikan keterangan secara positif bahawa hasil daripada ujian-ujian beliau telah menunjukkan yang bahan tumbuhan tersebut adalah kanabis seperti yang ditafsirkan di bawah s 2 Akta tersebut. Keterangan yang diberikan oleh ahli kimia adalah memuaskan dan betul. Sewajarnya, rayuan berhubung persoalan ini adalah tanpa merit (lihat ms 22H, 23A–B); *Leong Bon Huat v Public Prosecutor* [1993] 3 MLJ 11 dibeza.

(2) Hakim perbicaraan tidak membuat apa-apa penemuan pemilikan yang kukuh daripada keterangan tersebut. Beliau hanya bergantung kepada anggapan pemilikan dari segi undang-undang di bawah s 37(d) Akta tersebut. Dengan bergantung kepada anggapan di bawah s 37(d), hakim perbicaraan kemudian membuat anggapan pengedaran terhadap perayu di bawah s 37(da) berkaitan jumlah dadah tersebut. Justeru itu, hakim perbicaraan dengan jelas telah memakai ujian `double presumption', di mana beliau telah salah arah dalam undang-undang (lihat ms 24C-D); *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 diikut.

(3) Dalam *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169, Mahkamah Agong telah memutuskan bahawa ia adalah kewajipan mahkamah untuk menimbangkan sama ada atas imbangan kebarangkalian, pembelaan tersebut telah mematahkan anggapan statutori pengedaran di bawah s 37(da) Akta tersebut, sebagai satu cara yang berasingan, walaupun mahkamah telah berpuas hati atas imbangan kebarangkalian bahawa anggapan pemilikan di bawah s 37(d) Akta tersebut tidak dipatahkan, kecuali keterangan dalam kes tersebut tidak mewarankan sedemikian. Di dalam kes semasa, perayu tidak mengaku mempunyai milikan ke atas dadah tersebut. Oleh itu, tidak perlu bagi hakim perbicaraan untuk melakukan satu acara yang berasingan seperti yang telah dilakukannya berhubung dengan anggapan statutori di bawah s 37(da) Akta tersebut (lihat ms 24H–I, 25A–B); *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 dan *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644 diikut.

(4) Oleh itu, hukuman mati ke atas perayu dibatalkan. Pertuduhan terhadap perayu telah dipinda kepada satu yang di bawah s 12(2) Akta tersebut dan perayu telah dijatuhkan hukuman lima tahun penjara berkuatkuasa dari tarikh tangkapan beliau (lihat ms 25B).]

Notes

For cases on appeal against conviction and sentence, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 221–231.

A For cases on Dangerous Drugs Act 1952 s 39B(1)(a), see 4 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 371–374.

Cases referred to

B *Andy bin Bagindah v PP* [2000] 3 MLJ 644 (folld)
Leong Bon Huat v PP [1993] 3 MLJ 11 (distd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169 (folld)
Muhammed bin Hassan v PP [1998] 2 MLJ 273 (folld)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259 (refd)

C **Legislation referred to**

Dangerous Drugs Act 1952 ss 2, 37(d), (da), 39B(1)(a)

Appeal from: Criminal Trial No 47–12 of 1995 (High Court, Shah Alam)

D *Karpal Singh* (*Gobind Singh Deo* with him) (*Karpal Singh & Co*) for the appellant.
Mohd Iskandar bin Ahmad (Attorney General's Chambers) for the respondent.

E **PS Gill JCA** (delivering judgment of the court): This is an appeal against the decision of the High Court, Shah Alam where the appellant was charged for an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and sentenced to death at the conclusion of the trial.

The facts briefly stated leading to the arrest of the appellant are as F follows. On 27 December 1994 at about 11am, Detective Corporal 65379 Rahim bin Sulaiman ('PW6') together with Detective Corporal 63202 Jaafar bin Mahadon ('PW7') and Detective Sergeant 64011 Khabri bin Hj Dollah, on instruction of Chief Inspector Hassan Jalaluddin ('PW8') went on patrol duty on two motorcycles. They were instructed to keep a look out for a motorcar No BDH 883.

G At about 11.30am when PW6 and PW7 were on their patrol duty, PW6 saw a car parked outside house No 9, Jalan 1/1, Bandar Kinrara, Puchong. They saw the appellant standing beside the car on the driver's side. At this juncture, PW6 introduced himself as a member of the police force. He then seized a bunch containing 11 keys from the right hand pocket of the H appellant's trousers. After that, he proceeded to search the inside of the car and in the course of his search, he discovered a box on the floor of the car in front of the passenger's seat. When he opened the box he found two slabs of dried leaves which he suspected to be ganja. PW6 then informed PW8 of what he had found in the car, and PW8 examined the box and its contents.

After that, PW8 with a key from the bunch of keys seized from the I appellant opened the door, to house No 9, Jalan 1/1, Bandar Kinrara, Puchong. In the course of searching the house, PW8 discovered certain items suspected to be ganja. However, the items seized in the house do not

form part of the charges against the appellant. The appellant at the trial denied the charge framed against him. A

At this hearing of the appeal before us, counsel for the appellant raised a number of issues. However, two pertinent issues worthy of consideration are, firstly, that the trial judge was wrong in accepting the evidence of the chemist PW4, and secondly, that the trial judge was wrong in invoking, the presumption of trafficking upon a presumption of possession of ganja, thereby seriously misdirecting himself in law. B

In respect of the issue of the evidence of the chemist, he stated that he conducted a separate analysis of the content of the packets marked as 'A' and 'A1' which were handed to him by Ketua Inspektor Abdul Razak bin Hassan. In his evidence, he stated: C

> I conducted separate analysis on the two packets, ie 'A' and 'A1'. For packet 'A' what I did were as follows:
>
> (1) I obtained the net weight of the block of the compressed plant material. I then loosen up completely the compressed plant material to carry out the physical examination on all the plant material. I found all the plant material to belong to one type similar to cannabis. No foreign material in it. D
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> (2) I then carried out microscopic examination on all the plant material and found all of them to bear the characteristic features of cannabis. They are:
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> (i) cystolith hairs;
> (ii) simple hairs; E
> (iii) grandular hairs; and
> (iv) abundance resin at their natural state.
>
> My conclusion after the two examinations is that the entire plant is from genus cannabis.
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> I, after that, took 32 random samples from the bulk of the plant material to perform the Duquenois-Levine (DLT) Test and Thin Layer Chomotrophy (TLC). The purpose of the two tests is to detect the presence of cannabinoid in the resin that I observed in all the plant material. From the two tests that I did, I concluded that cannabinoid were present. Therefore I conclude that all the plant material from the compressed in 'A', is cannabis as defined under s 2 of the [Dangerous Drugs Act 1952] DDA 1952. F
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> Similar analysis was carried out from the compressed block plant material marked 'A1'. I obtained the same result that they were cannabis as defined under s 2 of the DDA 1952. G
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> Cannabinoid are the active ingredient of cannabis. After the physical and microscopic examination, I have concluded that all the plant material were of genus cannabis. There was only one type of plant material. So if any part of the plant material is found to be cannabis as defined under s 2 of the DDA, the entire bulk must be the same. Therefore there is no necessity to subject the entire plant materials for the DLT and TLC test. H

We observed that the chemist took representative samples at random from the different parts of the impugned drugs in packages 'A and 'A1' for analysis. We are of the view that the facts in the case of *Leong Bon Huat v Public Prosecutor* [1993] 3 MLJ 11 referred to us by appellant's counsel are distinguishable, as in that case, the chemist stated that out of the total I

A amount of cannabis weighing 793.85g, he merely took representative samples of 79.30g for analysis, leaving the balance of the cannabis not analysed.

It is clear that the chemist carried out a detailed analysis of the plant contained in the two packets and he testified positively that the result of his B test showed that the plant material examined by him was cannabis as defined under s 2 of the Act.

It is our considered view, the evidence given by the chemist was satisfactory and cannot be faulted. In the premise, we hold that the appeal on this issue is without merit.

C There is, however, merit in the second ground of appeal advanced before us by counsel for the appellant. Learned counsel, Mr Karpal Singh argued that the trial judge had wrongly found the appellant to be trafficking in the said drugs, by merely acting on the presumptions under s 37(d) and (da) of the Act. In other words, the trial judge first found the appellant to have had custody and control of the drug in question. He accordingly in D terms of s 37(d) of the Act presumed that the appellant was in possession of the drug. Having found the appellant to be in possession through the process of reasoning as stated above, the learned judge held the appellant to be a presumed trafficker under s 37(da) since he was 'found in possession' of more than the statutory minimum prescribed in the subsection.

E Counsel for the appellant argued that by applying a 'double presumption' test against the appellant, the trial judge had seriously misdirected himself in law. Counsel relied on a number of cases to support his argument, but the case of *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 is most relevant to the facts of this appeal. The court in *Muhammed bin Hassan* stated at pp 287-288:

F

> In our view, there is a clear undeniable distinction between the word 'deemed' used in s 37(d) and the word 'found' employed in s 37(da) of the Act. The 'deemed' state of affairs in s 37(d) (ie, deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the G basic or primary facts necessary to give rise to that state of affairs, ie the finding of custody or control. Such presumptions as under s 37(d) (and, for that matter, the one under s 37(da)) are sometimes described as 'compelling presumptions' in that upon proof of certain facts by a party (in our present case, proof of custody or control in s 37(d) by the prosecution), the court *must* in law draw a presumption in its favour (ie presumptions of possession and knowledge) unless the other party proves the contrary. Such a presumption H has the compelling force of law. It is a deduction which the law requires the trial court to make. On the other hand, the word 'found' in the opening phrase of s 37(da) connotes a finding after a trial by the court.
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> Furthermore, the basic or primary facts needed to raise 'deemed' possession and 'deemed' knowledge under s 37(d) of the Act and those I required to raise 'presumed ... trafficking' under s 37(da) are different. To come to the presumptions of possession and knowledge under s 37(d), one need only to arrive at a finding of having had 'in custody or under ... control anything whatsoever containing' the drug (as opposed to the drug itself)

whereas to arrive at the presumption of 'trafficking' under s 37(da), a finding of being 'in possession' of the drug is necessary (in addition, of course, to proof of the relevant minimum quantity specified). In view of the above differences, it would be unduly harsh and oppressive to construe the automatic application of presumption upon presumption as contended by the learned deputy public prosecutor — a construction that ought to be adopted only if, upon the wordings of the two subsections, such an intention of the Parliament is clear, which, in our opinion, is not.

In our view, to constitute 'possession' under s 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence. (Emphasis added.)

We feel that the trial judge, with respect, made no affirmative finding of possession on the evidence. He merely relied on the legal presumption of possession under s 37(d) of the Act. Having relied on the presumption under s 37(d), he proceeded to make a further presumption of trafficking against the appellant under s 37(da) in view of the amount of drugs. The trial judge had clearly applied the 'double presumption' test, thereby misdirecting himself in law.

However, we have not overlooked the Federal Court case of *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259. In that case, Gopal Sri Ram JCA stated at p 266:

As a general rule this court will, in the normal course of events, quash a conviction where there has been a misdirection. Exceptionally, a conviction will be upheld despite a misdirection where this court is satisfied that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction. The decision of the court in *Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209 exemplifies the general rule, while that in *Khoo Hi Chiang v PP* [1994] 1 MLJ 265 illustrates the exception.

On the facts of the case, we are not minded to consider the proviso of s 60 of the Courts of Judicature Act 1964 to sustain the conviction of trafficking as we find a paucity of evidence on the facts of the case to suggest trafficking within the definition of s 2 of the Act, or carrying out a preparatory act done for the purpose of trafficking.

In passing, an important aspect that was overlooked by the trial judge and counsel when addressing the court was that the defence of the appellant in the present case was a total denial of possession of the drug. This has an important bearing, as a distinction should be drawn between a mere denial, vis-a-vis an explanation in a defence, that although he was in possession of the drug, he was an innocent carrier, or a momentary carrier.

In the Supreme Court case of *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169, the court held that unless the evidence in a particular case does not obviously so warrant, it is incumbent upon the court to consider whether on a balance of probabilities the defence has rebutted the statutory presumption of trafficking under s 37(da) of the Act, as a separate exercise, even though the court is satisfied on a balance of

probabilities that the presumption of possession under s 37(d) of the Act has not been rebutted.

An important qualification in *Mohamad Radhi* is the phrase 'Unless the evidence in a particular case does not obviously so warrant'. This phrase to one's understanding, would apply, where total denial in the circumstances of the present case, there was thus no need for the trial judge to undertake a separate exercise as he had seemed to have done in respect of the statutory presumption under s 37(da) of the Act. In this we are fortified by the recent decision of *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644 where Shaik Daud Ismail JCA had this to say about the defence of a total denial in the context of the direction in *Mohamad Radhi*. He quotes (at p 647):

> In the present case, the appellant had denied possession and the learned judge found that after considering the whole evidence, including that of the appellant, he was satisfied that the prosecution had proved their case beyond a reasonable doubt and the appellant had failed to raise any doubt, we find no reason to disagree with the learned judge. Therefore, the circumstances in the present case did not warrant the learned judge to undertake a separate exercise.

Having reviewed the evidence afresh, and the law in totality, the court amended the charge against the appellant to one of under s 12(2), quashed the sentence of death, and sentenced the appellant to five years imprisonment with effect from his date of arrest.

Charge amended to one under s 12(2) and sentenced to five years imprisonment. Death sentence quashed.

Reported by Lim Lee Na